(1) Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTINA BREWER, Personal Representative for the Estate of Richard Brewer,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States District Court for the Northern District of California

PETITION FOR A WRIT OF CERTIORARI

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28pp

QUESTIONS PRESENTED

I. Where the statutory mission of the Coast Guard is to "save lives" and it is publicly funded, equipped, trained and staffed for that mission, and claims expertise in search and rescue, should the Coast Guard be cloaked with "Good Samaritan" immunity, or should the Coast Guard's actions in undertaking a rescue be judged by the same standard as all other actors -negligence **under the circumstances**?

II. Where there is a conflict in the circuits with respect to evaluating Coast Guard liability for a failed rescue (an issue upon which the Supreme Court has never ruled), should this court take review and clarify the applicable standard?

LIST OF PARTIES

Petitioner, Christine Brewer, is the personal representative of her husband's estate, and appears here on behalf of herself and their young child. Defendant is the United States of America because the petitioner's claims arise from the conduct of the United States Coast Guard.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

NO. _____

Christina Brewer, Personal Representative for the Estate of Richard Brewer, Petitioner

v.

United States of America, Respondent

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the Opinion of the Ninth Circuit Court of Appeals, issued in this case on December 30, 1999, affirming the district court dismissal of Petitioner's complaint.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California was filed June 25, 1998. The opinion of the Ninth Circuit Court of Appeals is unreported and is reproduced as Appendix A.

JURISDICTION

The Ninth Circuit opinion was filed December 30, 1999. This court has jurisdiction pursuant to 28 USC section 1254.

STATUTORY OR CONSITUTIONAL PROVISIONS INVOLVED

14 USCS § 88 (2000)

§ 88. Saving life and property

(a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

* * *

(b) (1) Subject to paragraph (2), the Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.

STATEMENT

This petition challenges the Ninth Circuit's rule applying a "Good Samaritan" rule of non-liability to the Coast Guard, even where the court assumed the Coast Guard to be negligent in carrying out an attempted rescue. This rule conflicts with the Fifth Circuit, which

would apply an ordinary negligence standard on these facts.

Petitioner's decedent, Richard Brewer, died on October 29, 1994, when the fishing boat he was using capsized in the surf in Monterey Bay, California and he was trapped underneath the boat which was wedged into the shore. Mr. Brewer was still alive when his boat reached the shore but he was trapped underneath the boat and bystanders on the beach, including an elderly couple, were unable to lift the boat off Mr. Brewer and he drowned.

For almost twenty-one minutes before his death, Mr. Brewer was in radio contact with the Monterey Bay Coast Guard station, which was located within ½ mile of where Mr. Brewer and his fishing companion were stranded without power and without an anchor. Appendix B is a visual re-creation of the time line showing where the Coast Guard vessel would have rescued Mr. Brewer had the vessel actually departed when Mr. Brewer was told it had, and where the Coast Guard would have intercepted Mr. Brewer's fishing boat if the Coast Guard had left at a reasonable time after first receiving the distress call, and at times when it recognized the extreme danger he was in.

Although the Coast Guard dispatcher recognized the "inherent danger of being at sea without power" and advised Mr. Brewer and his fishing companion to don their life jackets because the dispatcher believed someone was going to end up in the water, the Coast Guard: delayed rescuing Mr. Brewer for over 20 minutes until it was too late; mis-communicated the urgency of the rescue to the crew dispatched to rescue

Mr. Brewer; failed to call onshore 911 until **after** Mr. Brewer's boat capsized and became wedged into the shoreline; assured Mr. Brewer a vessel was "enroute" to rescue him even though it would not depart for another 5 minutes; and disregarded all of the risks (well-known to Coast Guard crewmembers) associated with being without power in Monterey Bay.

Mr. Brewer's widow sued in federal district court in Oregon. On defendant's motion, the case was transferred to California.

I. Trial Court Proceedings

Plaintiff filed her complaint in the federal district of Oregon on October 18, 1996. After transfer to the Northern District of California in March, 1997, the government moved for summary judgment, which was granted.

II. Trial Court Rulings

The trial court granted defendant's motion for summary judgment in a written opinion that applied existing Ninth Circuit law, Berg v. Chevron USA, Inc., 759 F2d 1425, 1430 (9th Cir 1985) and concluded, as a matter of law, that the Coast Guard did not negligently worsen the decedent's situation and that there was no evidence of recklessness. In evaluating the Coast Guard's conduct, the district court began with the time when it determined the Coast Guard "undertook the rescue of the Foxtrot." Opinion, p. 7.

III. The Ninth Circuit Opinion

In affirming the district court grant of summary judgment, the Ninth Circuit also applied Berg and, although it "assumed" the Coast Guard had been negligent after it undertook to rescue Mr. Brewer, the court declined to find liability based on its conclusion "there is nothing in the record to support a finding that the Coast Guard intentionally delayed the rescue or acted with a conscious disregard for the risks involved. The Coast Guard was responding to the risk, and its conduct was not reckless or wanton." (Opinion, pp. 2-3)

The Ninth Circuit also rejected plaintiff's contention that the Coast Guard worsened Mr. Brewer's situation by assuring him there was a "vessel enroute" when, in fact, no vessel had yet departed the dock and would not do so for more than 5 minutes. The Ninth Circuit considered the evidence regarding this issue and made its own determination that plaintiff's evidence and argument were insufficient.

Finally, the Ninth Circuit rejected plaintiff's invitation to "reexamine the scope of liability of the Coast Guard under established federal law", concluding that it was "bound by the existing law". (Opinion, p. 3; Appendix A, p. 3)

REASONS FOR GRANTING THE WRIT

A. THERE IS A CONFLICT IN THE CIRCUITS

1. The Fifth Circuit applies a negligence standard

Unlike the Ninth Circuit, the Fifth Circuit applies a negligence standard to actions taken by the Coast Guard, even when the actions occur in the midst of a rescue operation. United States v. Gavagan, 280 F2d 319 (5th Cir 1960). In Gavagan, the district court entered judgment against the government for the negligence of Coast Guard employees in their unsuccessful attempt to rescue the crew of a stranded vessel. Coast Guard employees, acting under their statutory duties pursuant to the National Search and Rescue Plan, undertook the unsuccessful rescue of a shrimp boat off the Florida coast, but during the rescue attempt, shore-based personnel mis-communicated information about the location of the shrimp boat to would-be Coast Guard rescuers. The Fifth Circuit affirmed the judgment against the government saying: "the critical mistakes were made, not by men taking great personal risk in heroic salvage service under trying conditions, but by those ashore in the failure to pass on and evaluate vital information." 280 F3d at 325, footnote omitted.

In this case, the Coast Guard dispatcher at Monterey Bay acknowledged he considered Mr. Brewer to be in moderate danger less than one minute into the radio transmission between Mr. Brewer and the Coast Guard station at Monterey Bay (1/2 mile away from where Mr. Brewer and his fishing companion were stranded without an anchor and with a malfunctioning engine).

Nonetheless, this information was not communicated to the crew who were eventually sent to rescue Mr. Brewer. Based on this lack of information, the crew moved slowly, without urgency when, had they understood the emergency, they could have rescued Mr. Brewer in 3 minutes or less, according to their testimony. Instead, Mr. Brewer died 20 minutes after he initially contacted the Coast Guard, trapped under his fishing boat on the shore of Monterey Bay with insufficient aid on the shore because 911 was not called by the Coast Guard in time to arrive there.

Had this action been filed in the Fifth Circuit, the Coast Guard's actions would have been evaluated (appropriately) under a simple negligence standard and there would have been liability to his widow and his infant son. Instead, because this case was decided under Ninth Circuit law, even though the court conceded the Coast Guard was negligent in undertaking the rescue and in the way it was implemented, there is no liability because the Ninth Circuit applies a higher standard, requiring recklessness or negligent worsening.[1]

---

[1] Plaintiff below, Petitioner here, believes the record demonstrates both recklessness by the Coast Guard and negligent worsening. The Coast Guard was reckless in disregarding what it knew about the urgency of Mr. Brewer's predicament (he was without anchor, without power, at sea – an "inherent danger", and he was drifting toward the surf in Monterey Bay, with the danger increasing every minute, and was likely to end up in the water) and also that they negligently worsened his condition by assuring him help was on the way (when it was not) and thus caused him to stay on the radio talking to the Coast Guard dispatcher when his boat capsized. His fishing companion, who was not on the radio, was tossed away from the boat and survived. Mr. Brewer was trapped in the cabin area where he had been receiving assurances of rescue from the Coast Guard.

A recent Fifth Circuit decision demonstrates this stark contradiction in the laws of the two circuits. In Coumou v. U.S., 107 F3d 290 (5th Cir 1997) a vessel captain brought a negligence action against the Coast Guard for its actions in turning the captain and his vessel over to Haitian authorities without telling the authorities the captain had been cooperating with the Coast Guard's seizure of his vessel for illegal drug cargo loaded by some of his crew members. In fact, the captain had radioed the Coast Guard crew asking them to board his vessel and search for the contraband. Because the Coast Guard neglected to convey this information to Haitian officials, the captain was imprisoned for six months in a Haitian jail and suffered serious physical and mental injuries. On an appeal by the government, the Fifth Circuit remanded for a determination of "whether the [Coast Guard's] failure to convey information to Haitian authorities constituted a breach of its duty of reasonable care." 107 F3d at 296. The Coast Guard's search and rescue operations should be evaluated in all circuits under this same negligence standard. This court should grant this Petition, reexamine the scope of Coast Guard liability, and resolve the conflict in the circuits.

2. Even the Ninth Circuit recognizes a duty to exercise reasonable care in carrying out a rescue.

The result in this case cannot be reconciled with the Ninth Circuit's recognition that "once the Coast Guard begins a rescue, it must use reasonable care in carrying it out." Bunting v. U.S., 884 F2d 1143, 1147 (9th Cir 1989) citing United States v. DeVane, 306 F2d 182 (5th Cir 1962). Here, there is no dispute the Coast Guard undertook to rescue Mr. Brewer. At 7 minutes, 40 seconds into the radio transmissions between Mr. Brewer

and the Coast Guard Monterey Station, Mr. Brewer is told: "we have a vessel enroute your position, over." (ER 43) Nonetheless, the vessel was not enroute, would not depart for another 5 minutes, headed in the wrong direction and thus would not arrive in time to save Mr. Brewer because the skipper of the Coast Guard vessel was not told of the urgency of Mr. Brewer's plight and therefore moved slowly, without urgency, arriving in time (17 minutes, 32 seconds elapsed time) to see Mr. Brewer's fishing boat crash into the shore line with Mr. Brewer wedged underneath. The skipper testified it would have taken him less than 3 minutes to reach Mr. Brewer's location had he moved with urgency.

Under Ninth Circuit law in Bunting and under Fifth Circuit law in Gavagon, the Coast Guard would have been liable to Mr. Brewer's widow and child for its negligence. Nonetheless, because the Ninth Circuit applied Berg's rule of non-liability, a rule justified by a desire to encourage voluntary rescue by "men of the sea", the complaint was dismissed. This was not a rescue attempt by men taking great personal risk in heroic salvage service under trying conditions. It was a failure by the Coast Guard to make what should have been a routine pickup in its own backyard. This court should clarify the applicable standard of care and create a clear, consistent guide for analyzing Coast Guard liability.

B. COURTS ROUTINELY EVALUATE NEGLIGENCE "UNDER THE CIRCUMSTANCES"

There exists a multitude of cases wherein government actors like the Coast Guard are held to a standard of

reasonable care. For example, in Sutton v. Earles, 26 F3d 903 (9th Cir 1994) the Ninth Circuit applied a negligence standard to government actors (the Navy and the Coast Guard) where it was alleged the failure to remove a submerged obstacle (a navy mooring buoy) in a [river or lake] may create liability because "injury is foreseeable" where the government knows pleasure boat traffic may use the channel and may collide with the buoy. The court defined the standard as follows: "A duty of care exists when injury is foreseeable." Id. at 912.

Under Ninth Circuit law, the government may be liable for failing to apply its "superior knowledge" of the propensities of polar bears to attack at a remote Air Force site in Alaska. Chaffin v. U.S., 176 F3d 1208 (9th Cir 1999). So too, the Coast Guard should be held accountable to use its "superior knowledge" of the risks of being at sea in deciding its culpability to stranded boaters who have been assured of rescue assistance.

Other examples include cases where the Coast Guard is held to a negligence standard for placing and maintaining marking buoys. Thus, if a buoy is negligently maintained, the Coast Guard may be liable if it fails to exercise reasonable care in implementing the buoy grid and fails to warn a mariner of the hazards. Olympia Sauna Compania Naviera, SA v. U.S., 670 F Supp 1498 (D. Or. 1987). Judge Leavy, then a district judge for the district of Oregon, now a Ninth Circuit judge, cited Indian Towing for the proposition that, where the government undertakes to warn the public of danger and thereby induces reliance, it must perform its task reasonably. 670 F Supp at 1504. The Second Circuit reached the same conclusion regarding buoy placement in Eklof Marine Corp. v. United States, 762 F2d 200 (2nd Cir 1985).

There, the Coast Guard was also held liable for its negligent placement of a buoy.

In this matter, the Coast Guard undertook to assure Mr. Brewer a vessel was enroute to rescue him. It was not, because of the Coast Guard's negligence in dispatching the vessel and in communicating between Coast Guard personnel. The Coast Guard vessel left at such a leisurely pace that it took more than 4 minutes to clear its own dock, once it finally got underway, at a time when the Coast Guard knew of the extreme danger. For this failure to act reasonably, the Coast Guard should be liable.

In Huber v. U.S., 838 F2d 398 (9th Cir 1988), the plaintiff recovered a settlement from the Coast Guard and the ship's owner for a failed rescue attempt. In a subsequent action for contribution between the Coast Guard and the ship's owner, the Ninth Circuit evaluated whether the Coast Guard's conduct in undertaking a rescue was shielded by discretionary immunity. The court concluded it was not, because: "This is not a case where the Coast Guard decided to conserve resources by not assisting vessels in certain situations. Instead, the Coast Guard decided to aid the [vessel], and then allegedly did so in a negligent manner." 838 F2d at 401. The court thus concluded the Coast Guard could be liable for its negligence in carrying out the rescue. Id.

The result in Huber cannot be reconciled with the result here where, even though the Ninth Circuit assumed negligence by the Coast Guard in carrying out the rescue of Mr. Brewer, it found no liability as a matter of law.

The negligence standard is appropriate and useful in these cases because it takes into consideration the actual circumstances existing in the situation. Thus, if this standard applied to the Coast Guard, the court or a jury can consider whether the Coast Guard rescuers are acting at great risk to themselves – such as a rescue at high sea, with adverse weather conditions and rapidly changing circumstances, or conversely, if, as occurred in this case, the Coast Guard dispatcher has readily available personnel and equipment, has an understanding of the risks faced by the stranded boater, has ample time to dispatch help to the boat which is only ½ mile away and nonetheless fails to successfully rescue the boater because, in part, the dispatcher does not disclose the urgency of the situation to the crew dispatched to rescue the boater. A trial judge then could decide whether the delay (over 15 minutes) to attempt the rescue, when crew members testified they could have been there in 3 minutes or less, is "reasonable under the circumstances" or whether the Coast Guard should be liable for its actions like any other actor under our rule of law.

C. THE COAST GUARD'S MISSION IS RESCUE, IT IS NOT A GOOD SAMARITAN

There is no plausible rationale for treating the Coast Guard like the untrained, ill-equipped volunteer who undertakes a rescue at great personal peril solely out of a concern for another human being. There simply is no comparison, for example, between the well-trained, highly equipped, experienced crew of the Monterey Bay Coast Guard station, self proclaimed experts at search and rescue, and any "Good Samaritan" such as the elderly couple on the beach who tried to lift the boat off Mr. Brewer and to save his life. To apply the same immunity

that might be enjoyed by the elderly couple to crew members from one division of our military forces whose mission is to "save lives" and whose motto is "always ready", is an unwarranted, ill-conceived policy.

The source of this old, but analytically weak and outdated rule of law is a 1951 decision of the district court in Massachusetts, Lacey v. U.S.. This court should reexamine and change the rule. As this court recognizes, repetition for 50 years of bad law does not make it good. Metropolitan Stevedore Company v. Rambo, 515 US 291, 132 LEd 2d 226, 115 S Ct 2144 (1995).

This rule of law should be changed because:

I. Its origin is suspect and is unsupportable in modern society; and

II. There is no valid policy rationale for Coast Guard immunity in rescue operations.

The history of the Good Samaritan immunity enjoyed by the Coast Guard is traced back to a 1951 decision of the district court in Massachusetts, Lacey v. United States. Lacey is factually distinguishable and its legal foundation is weak, at best. The district court was asked to resolve whether an aviation service whose plane had crashed could recover from the Coast Guard for its negligent failure to rescue the pilot and others who had been flying in the aviation service's plane. Thus, the case did not arise in facts that are typical in these cases, where a boater is stranded and calls the Coast Guard for assistance. Yet, for nearly 50 years the case has been

applied to the stranded boater cases and has served as a form of immunity for Coast Guard failure to rescue cases.

The rationale underlying the rule of non-liability from Lacey was later explained by the Third Circuit as the deleterious effect liability may have on military promotions and service records. P. Doughtery Co. v. United States, 207 F2d 636, 634 (3rd Cir 1953). The dissent in Doughtery urged that the Coast Guard be held accountable as any individual would for their own failure to exercise reasonable care:

"In other words, one who carelessly hurts the person or property of another is liable, whether he was rendering his service for pay or for nothing. With a statute making the United States, with specified exceptions, liable as any individual would be, the application of the general rule seems pretty clear in this case. And the United States need have no more fear of consequences than anyone else." 207 F3d at 651.

The only authority cited in Lacey for its rule of non-liability is a Harvard Law Review Article entitled, "Reliance on Gratuitous Promises or other Conduct", 64 Harvard Law Review 913-928 (1951). There is no analysis in Lacey to support its theory that the Coast Guard should be immune from liability or to explain how the Coast Guard is like a "Good Samaritan".

The better reasoned opinion is that of the Fifth Circuit in Gavagon where the court concluded there was no policy rationale for affording the Coast Guard immunity from liability for its negligence:

> "imposition of liability, i.e. a duty, will not deter performance of like search and rescue projects by the Government. The Government's vast machinery is put into operation, not out of any hope of reward, but out of a policy determination on the highest executive level that the resources of governmental agencies should be exploited effectively to save life and property." 280 F2d at 326 (footnote omitted)

There are few similarities between the Coast Guard and a Good Samaritan. Unlike a typical Good Samaritan, the Coast Guard has nearly a one-hundred year history of saving lives at sea. In 1915, Congress created the Coast Guard by merging two existing agencies, the Revenue-Cutter Service and the Life-Saving Service. Congress declared that "all duties now performed by the Revenue-Cutter Service and Life-Saving Service shall continue to be performed by the Coast Guard". Annual Report, 1915, p. 43, quoted in Robert Erwin Johnson, *Guardians of the Sea – History of the United States Coast Guard 1915 to the Present*, Naval Institute Press, Annapolis, Md (1987), p. 36. The Life-Saving Service evolved from private efforts in the late 1700's and early 1800's to establish lifeboat stations and line-throwing equipment at dangerous locations on the Massachusetts coast. By 1847, Congress responded to the growing number of shipwrecks off American shores by providing funding of $4,000 for equipping "lighthouses and other exposed places where vessels are liable to be driven on shore, with boats and other suitable means of equipment". Id., p. 4. "Thus began the movement that in due course would grow into the U.S. Life-Saving Service." p. 5. The Service experienced early success when, for example, in

1850, after the stranding of the British ship Ayshire, 201 persons out of 202 passengers were saved.

Also unlike the typical Good Samaritan, the Coast Guard continues to be funded, equipped, and its crew trained for its rescue mission. In keeping with its heritage, the 1998 Annual Report issued by the Coast Guard lists its motto at the end of each page - "America's Lifesaver and Guardian of the Sea." The Report touts the Coast Guard's expertise in rescue operations and lists as one of its accomplishments, response to 38,700 distress calls in 1998. As early as 1955, for example, a Coast Guard rescue necessitated by California floods involved Coast Guard units including "six aircraft, twenty-one cutters and boats and twenty-nine vehicles" belonging to the Coast Guard and with the assistance of twenty-one aircraft belonging to the other armed services. Any analysis of Coast Guard liability for failed rescue must take into consideration its expertise, training, equipment, resources and personnel. The actions of the Coast Guard should be evaluated like a person in "like circumstances", i.e. a highly trained, well-equipped, specialized division of the United States military.

In contrast to the citizen who chooses to act as a Good Samaritan and who should enjoy limited immunity for the choice to put their lives at risk to save another, the Coast Guard has as its statutory mission to "perform any and all acts necessary to rescue and aid persons and protect and save property". 14 USC section 88. Thus, the traditional rationale of providing immunity in order to encourage private citizens to risk their lives to save others at sea, is unnecessary, even absurd, as applied to the Coast Guard.

In Berg v. Chevron USA, Inc., 759 F2d at 1429, the Ninth Circuit restated its rule that "a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue." In Berg, the alleged wrongful conduct was that of Chevron, not the Coast Guard. The proferred rationale in Berg for applying a standard of care higher than an ordinary negligence standard is the admiralty law's desire to "encourage and induce men of the sea to go to the aid of life and property in distress." 759 F2d at 1429, citing 3A M. Norris, *Benedict on Admiralty* section 234 (7th ed. 1980)

Nowhere does the Ninth Circuit explain why the Coast Guard needs encouragement to go to the aid of life and property in distress, when to do so is its stated mission and it is authorized by statute to perform that mission. In contrast to the passerby, the Coast Guard undertakes rescues because it exists, in part, for that purpose. There is no need of any incentive or special treatment. The rationale supporting a Good Samaritan rule of non-liability for negligence is unavailing in analyzing the Coast Guard's conduct and should not be applied. There is no statute modifying the abrogation of Sovereign Immunity to protect the Coast Guard in this way.

The government is held liable for its negligence in many other arenas. There is no policy or other basis for treating the Coast Guard differently.

CONCLUSION

This court should grant the Petition and review and change the law granting Good Samaritan immunity to the Coast Guard.

DATED: March 20, 2000

Respectfully submitted,

HELEN T. DZIUBA,
ATTORNEY AT LAW

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Personal Representative for
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16345
D.C. No. CV-97-00902-MJJ

Christina Brewer, Personal Representative
for the Estate of Richard Brewer,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Argued and Submitted November 5, 1999
San Francisco, California

Before: GOODWIN, SCHROEDER,
ALARCÓN, Circuit Judges.

Christina Brewer, as personal representative of the Estate of Richard Brewer, her late husband, appeals the district court's summary judgment dismissal of her action against the United States under the Public Vessels Act, 46 U.S.C. § 781. Richard Brewer drowned when his small

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

boat capsized in the surf of Monterey Bay before the Coast Guard rescue ship reached him.

Our law is well settled that a rescuer is liable only for reckless and wanton conduct in performing the rescue, or for negligent conduct that worsens the position of the victim. See Berg v. Chevron USA, Inc., 759 F.2d 1425, 1430 (9th Cir. 1985). The United States is liable only to the extent that a private person would be liable under the same circumstances. See Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 228 (1945); Dearborn v. Mar Ship Operations, Inc., 113 F.3d 995, 996 (9th Cir. 1997).

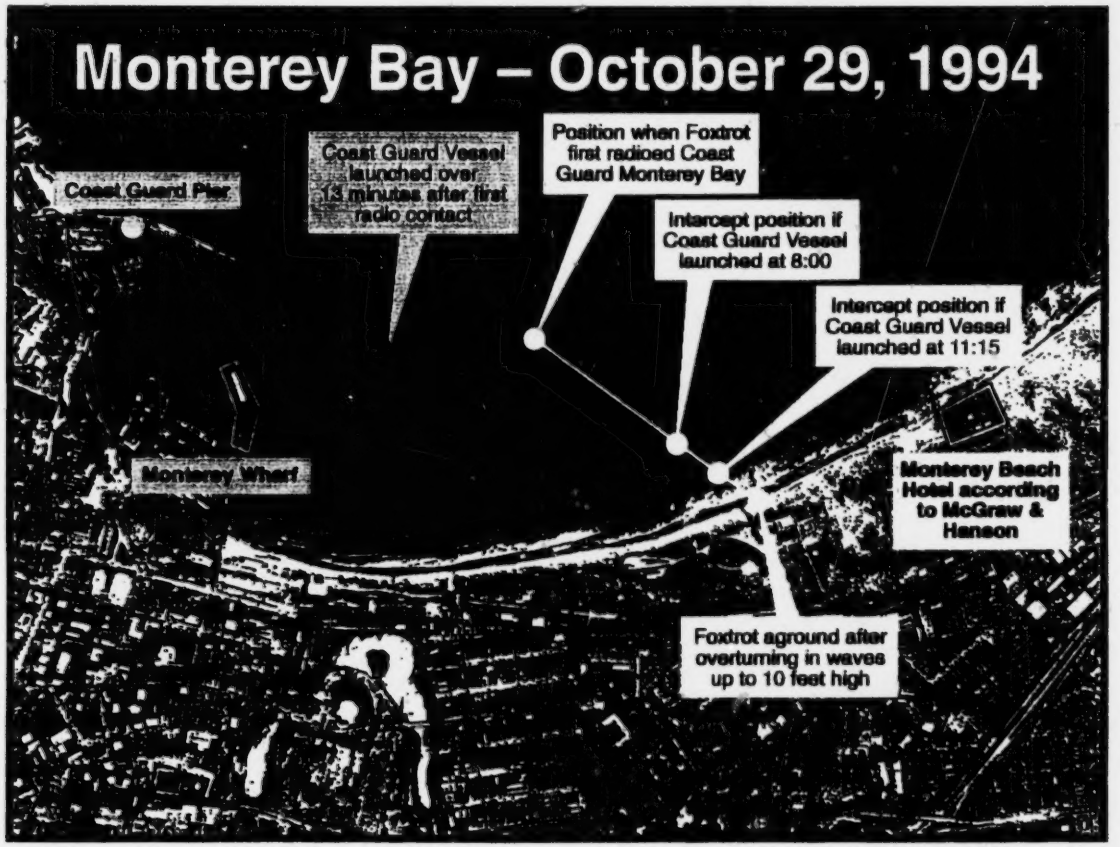
The Coast Guard reached the capsized Brewer boat approximately thirteen minutes after it undertook the rescue mission. We assume that some of the delay in reaching the boat and summoning ground emergency services is attributable to negligence, but there is nothing in the record to support a finding that the Coast Guard intentionally delayed the rescue or acted with a conscious disregard for the risks involved. The Coast Guard was responding to the risk, and its conduct was not reckless or wanton.

Plaintiff also contends that the record supports an inference that the Coast Guard worsened the decedent's position by continuing to talk to him on a radio located inside the cabin of the boat, causing him to be in a vulnerable position when the boat capsized. The record establishes, however, that Brewer was at the helm of the boat when it capsized and that the helm was on the deck

of the boat rather than inside the cabin. Hoover stated in his deposition that the last time he saw Brewer, he was standing at the helm with the radio handset in his hand. Hoover's deposition also states that the helm was in the cockpit area of the boat not in the tiny cabin in which a person could not stand upright.

Plaintiff asks us to reexamine the scope of liability of the Coast Guard under established federal law, but this court is bound by the existing law.

The judgment of the district court in favor of the defendant AFFIRMED.


Monterey Bay – October 29, 1994
Coast Guard Pier
Coast Guard Vessel launched over 15 minutes after first radio contact
Position when Foxtrot first radioed Coast Guard Monterey Bay
Intercept position if Coast Guard Vessel launched at 8:00
Intercept position if Coast Guard Vessel launched at 11:15
Monterey Wharf
Monterey Beach Hotel according to McGraw & Hanson
Foxtrot aground after overturning in waves up to 10 feet high